In the Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-399

JOSEPH MAYSE AND THOMAS MAYSE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend (1) that the trial court followed improper sentencing procedures; (2) that evidence of a prior similar act was improperly admitted; and (3) that the evidence was insufficient.

Petitioners were convicted in the United States District Court for the Eastern District of Michigan of possessing and selling altered coins, in violation of 18 U.S.C. 331. Thomas Mayse was sentenced to a term of three years' imprisonment; Joseph Mayse was sentenced to a term of six months' imprisonment to be followed by 18 months' probation. The court of appeals affirmed on June 18, 1974, and a petition for rehearing was denied on July 26, 1974 (Pet. App. 5a-6a). The petition for a writ of certiorari was not filed until October 9, 1974, and is therefore substantially out of time under Rule 22(2) of the Rules of this Court.

On June 1, 1970, Bonnie Mason, a customer in a coin shop, was approached by Thomas Mayse concerning some coins that he wished to sell (Tr. 12-13).[1] A short time later Mason met both petitioners outside the coin shop and was shown a 1909 penny and an 1889 Carson City minted silver dollar (Tr. 14-15). Mrs. Mason expressed interest in making a purchase and took the penny home to show her husband. Subsequently, a meeting was arranged at a nearby bar to discuss the sale of these and other coins. Mrs. Mason testified (Tr. 16):

> We gave them $75.00. I then obtained from Tom the 1889 Carson City silver dollar in Eddie Rhoads Bar. I gave them back the penny.

The following day, petitioners again approached Mrs. Mason and a fellow collector, offering a larger selection of coins for $8,000. When Mrs. Mason and her friend were unable to raise that amount, petitioners dropped the price to $5,000 and a sale was effected (Tr. 21-23). When Mrs. Mason subsequently attempted to trade some of the coins, she discovered that they had been altered and were not genuine (Tr. 23-25).

Mrs. Mason contacted the Secret Service and agreed to arrange a meeting between petitioners and an undercover agent. On June 11, 1970, Mason and Agent Bates met with petitioners, feigning interest in further purchases. Petitioners produced a bag of coins from the trunk of their car and offered to sell a quantity of coins for $10,000. Bates agreed to the sale after unsuccessfully attempting to bargain for a lower price (Tr. 27, 81, 87-99, 101). Bates took possession of the coins, examined and inventoried them, and marked one exceptionally valuable coin for identification (Tr. 79-82).

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[1] "Tr." refers to the transcript of trial proceedings.

Expert testimony established that all of the coins which had been sold to Mrs. Mason and Agent Bates, as well as other coins seized from petitioners' car, had been altered (Tr. 204-209).

At trial, the government presented testimony that Thomas Mayse had engaged in a similar scheme involving altered coins in 1969 (Tr. 165-166). The evidence was admitted as probative of Thomas Mayse's state of mind and intent (Tr. 330-331). The trial court gave repeated cautionary instructions as to the limited purpose for which the evidence was admitted and admonished the jury to consider the evidence only in respect to Thomas Mayse (Tr. 177-178, 199, 330-331).

Petitioners were convicted on June 8, 1973, and a pre-sentence investigation was ordered (Tr. 345). Sentencing was later scheduled for October 18, then rescheduled for October 23 at the request of defense counsel (Tr. 360-361). At the hearing on sentencing, petitioners, who had not been incarcerated, objected for the first time to the four-month delay in sentencing (Tr. 360, 365).

1. Petitioners claim that the four-month delay between conviction and sentencing, and the trial court's failure to apprise them directly of their right of appeal, contravened the requirements of Rule 32(a), Fed. R. Crim. P. Petitioners concede, however, that no prejudice resulted from the delay in sentencing (Pet. 7). The four-month delay therefore was not "unreasonable" under Rule 32(a). See *Brooks* v. *United States,* 423 F. 2d 1149, 1153 (C.A. 8), certiorari denied, 400 U.S. 872. See, also, *Pollard* v. *United States,* 352 U.S. 354, 361; *Juarez-Casares* v.

United States, 496 F. 2d 190, 192 (C.A. 5). Moreover, even an "unreasonable" delay in sentencing, if not objected to prior to the sentencing hearing, should not be a basis for reversing a conviction. Cf. *Barker* v. *Wingo*, 407 U.S. 514.[2]

Petitioners also contend that the court committed reversible error in failing to apprise them of their right to appeal. However, any error that was committed was rendered harmless by petitioners' timely filing of a notice of appeal and their subsequent prosecution of that appeal. See, *e.g.*, *Chapman* v. *United States*, 469 F.2d 634, 637 (C.A. 5); *Davis* v. *United States*, 464 F.2d 1009, 1013-1014 (C.A. 6); *United States* v. *Chapman*, 448 F.2d 1381 (C.A. 3), certiorari denied *sub nom. Overton* v. *United States*, 405 U.S. 929.[3]

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[2]Petitioners allude to, but fail to raise as error, a delay of over three years between arrest and trial (Pet. 8). Petitioners make no attempt to substantiate a claim of denial of a speedy trial, and the record contains no evidence which would support such an allegation. The court below considered this claim and rejected it without opinion (Pet. App. 6a). Applying the test enunciated by this Court in *Barker* v. *Wingo*, *supra*, petitioners were partially responsible for the delay, with the neutral factor of congested court calendars responsible for the remainder (Tr. 349); petitioners failed to assert their right to a speedy trial; and none of the factors giving rise to prejudice was present. See *Barker* v. *Wingo*, *supra*, 407 U.S. at 532.

[3]Petitioners also allege that the court erred in imposing general sentences. However, their reliance on *United States* v. *Yoppolo*, 435 F. 2d 625, 627 (C.A. 6), and *United States* v. *Davis*, 269 F. 2d 357, 363 (C.A. 6), certiorari denied, 361 U.S. 919, is misplaced. While expressing reservations as to the desirability of the practice, both courts affirmed general sentences where, as here, the sentence did not exceed the maximum that could be imposed on any count. See, also, *United States* v. *Kenny*, 462 F. 2d 1205, 1229-1230 (C.A. 3), certiorari denied *sub nom. Kropke* v. *United States*, 409 U.S. 914.

2. Petitioners also contend that the court erred in admitting evidence of Thomas Mayse's prior similar conduct. However, as is specifically acknowledged even in the decisions upon which petitioners rely (*Davis* v. *United States*, 370 F. 2d 310, 312-313 (C.A. 9), and *Mills* v. *United States*, 367 F. 2d 366, 367 (C.A. 10)), the admission of evidence of prior similar acts is appropriate in order to show knowledge, plan, intent, or absence of mistake. See, also, Rule 404(b) of the proposed Rules of Evidence for United States Courts and Magistrates. The prior conduct shown here was probative as to Thomas Mayse's knowledge that the coins had been altered and his fraudulent intent. The evidence was, therefore, properly admitted. See, *e.g.*, *United States* v. *Payne*, 467 F. 2d 828, 831 (C.A. 5), certiorari denied, 410 U.S. 912.[4]

3. Finally, petitioners argue that there was insufficient evidence to support their convictions on the counts alleging the sale of the coins. Count II of the indictment alleges that petitioners sold an 1889 Carson City silver dollar to Mrs. Mason. Mrs. Mason testified that she paid petitioners $75 and received the silver dollar in return. Petitioners' characterization of this transaction as a loan or an advance toward a future purchase is without foundation. There was no evidence of an agreement to repay the money, nor does the record indicate that petitioners expected the coin to be returned.

Court IV alleges that petitioners sold a quantity of coins to Agent Bates. The record indicates that petitioners offered to sell the coins to Bates for $10,000, an offer that he accepted, and that Bates received possession of the coins. From this, the jury properly found "an agree-

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[4]Petitioner Joseph Mayse also alleges that he was prejudiced, in light of this evidence, by a conflict of interest arising from defense counsel's representation of both petitioners. But he did not move to sever, nor did he object at any time to dual representation by retained counsel. It is, moreover, unclear in what way the evidence of Thomas Mayse's prior conduct created any conflict of interest not already inherent in the dual representation to which both petitioners had acceded. See, *e.g.*, *United States* v. *Gallagher*, 437 F. 2d 1191, 1194 (C.A. 7), certiorari denied, 402 U.S. 1009.

ment between parties to give and to pass rights of property for money which the buyer pays or promises to pay to the seller for the things bought or sold" (Jury Instructions, Tr. 329). The fact that the buyer's promise to pay was executory is immaterial. Cf. *United States* v. *Jenkins*, 347 F. 2d 345, 347 (C.A. 4).

Joseph Mayse also claims that there was insufficient evidence to support his conviction on any count of the indictment. However, 18 U.S.C. 2(a) imposes the same liability on a person who aids and abets the commission of a crime as would be imposed on a principal. Mrs. Mason's testimony regarding the events following her initial encounter with Thomas Mayse constantly refers to "them" and "they" when describing her transactions with petitioners. Joseph Mayse also represented to Mrs. Mason, as an inducement to purchase, that Thomas Mayse had been the proprietor of a coin shop that had gone bankrupt (Tr. 49). It was subsequently admitted that that representation was false (Tr. 253-254). Agent Bates' testimony also indicated that both petitioners were involved in the transaction with him *(e.g.*, Tr. 80-81, 108). There was thus sufficient evidence from which the jury could conclude that Joseph Mayse willfully associated himself with the criminal venture and encouraged its success. See *United States* v. *Bryant*, 461 F.2d 912, 919-920 (C.A. 6).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1974.